Constitutional Problems of a Unified Family Court System

The recently published working paper of the Law Reform Commission of Canada on the topic of the family court[1] proposes that there be one court in each province within which all family law matters can be heard.[2] The Commission recognizes that present constitutional limitations dictate that the court in question be the superior court of each province,[3] but is not satisfied that this court is the best court within which unification could take place. Accordingly, it indicates that constitutional amendment may ultimately be necessary to permit the achievement of the most satisfactory unification.[4] Leaving aside this possibility, what are those constitutional limitations which have led the Commission to say that unification must take place, if at all, in each province's superior court?

Unless exceptional circumstances were to arise, only the provincial legislatures can confer jurisdiction on courts in respect of substantive matters within their legislative competence; Parliament cannot do so.[5] When they do so, however, they are subject to two limitations: first, they cannot confer jurisdiction on federal courts, only on provincial ones;[6] secondly, they must confer jurisdiction of a type broadly conforming to that normally exercised only by provincial superior court judges on those judges alone and on no other persons, whether subordinate judicial officers of the provincial superior courts[7] or members of any other provincial courts.[8]

In respect of substantive matters within federal legislative competence, either the provincial legislatures or Parliament can confer jurisdiction on courts, subject to the usual rule regarding paramountcy of federal legislation.[9] If it is the provinces that are conferring such jurisdiction, they are subject to the same two limitations which were mentioned above in connection with their conferring of jurisdiction in respect of

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1. Working Paper No. 1, 1974.
2. **Ibid.**, 23.
3. **Ibid.**, 27.
4. **Ibid.**, 9.
5. (T)here is nothing in the **British North America Act** to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing provincial courts, or to give them new powers, **as to matters which do not come within the subjects assigned exclusively to the legislatures of the provinces** . . .

   Re Vancini (1904), 34 S.C.R 621, 626 (emphasis added). As to federal courts exercising original jurisdiction, it has been held that they can only administer federal law. See **R. v. Hume; Consolidated Distilleries Ltd. v. Consolidated Exporters Corp. Ltd.**, (1930) S.C.R. 531. The reference in the test to "exceptional circumstances" in which Parliament might have legislative authority is to take account of the "dimensions" doctrine, as to which, see, e.g., **The Aeronautics Case**, (1932) A.C. 54.
6. The **Hume** case, **ibid.**
7. **A.G. Ont. and Display Service Co. Ltd. v. Victoria Medical Bldg. Ltd.**, (1960) S.C.R. 32.
8. **The Adoption Act Reference**, (1938) S.C.R. 398.
9. See Laskin, **Canadian Constitutional Law** (rev. 3d. ed.), 1969, 818-20. See also **Re Judicature Amendment Act**, (1971) O.R. 521, 528-29 (C.A.).

substantive matters within their legislative competence. If it is Parliament which confers such jurisdiction, it is subject to neither of the above two limitations, viz., it can confer jurisdiction on any court whatsoever, whether federal or provincial, whether superior or not.[10]

What are the implications of all this for any attempt to unify judicial administration of family law matters? Since the legislative authority in the family law area is divided between Parliament and the provincial legislatures[11] and since Parliament cannot normally confer jurisdiction in respect of those substantive matters within provincial legislative competence, the provincial legislatures must be involved in any unification scheme. That being so, the two limitations on them mentioned above assume crucial importance. The first necessitates that the administration of family law be unified in a provincial rather than a federal court. Moreover, since there are some substantive matters within provincial legislative competence in which the provinces must confer jurisdiction on provincial superior court judges,[12] the second of these limitations further restricts the field of choice, necessitating that the provincial court chosen in the unification scheme be the superior court of each province.

Assuming now that the federal and provincial governments agree with the Law Reform Commission on the value of a unified family court system, they can achieve this result within the constitutional framework set out above relatively simply. Parliament can, in those family law areas within its legislative competence in which it has not already done so, confer jurisdiction in the provincial superior courts, while the provinces can do the same in respect of those family law areas within their legislative competence.

The Commission recognizes that, if a unification were achieved on the lines set out above, provincial superior court judges could be overwhelmed by their added workload unless their numbers were increased substantially. However, alternative methods of alleviating the impact on them of this unification would be either to have the legislation conferring jurisdiction on the superior courts confer some of it on subordinate judicial officers of those courts rather than on the judges themselves or to have the legislation authorize the judges to delegate some of their jurisdiction to the subordinate judicial officers. The Commission expresses no preference for one or the other of these alternatives, although it obviously contemplates the use of one of them. It does, however, point out that the

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10. **Papp** v. **Papp** (1970), 8 D.L.R. (3d) 389, 397 (Ont. C.A.).

11. See ss. 91(26), 92(12) and 92(13) of the B.N.A. Act, 30 & 31 Vict., c. 3 (U.K.). See also Jordan, "The Federal Divorce Act (1968) and the Constitution," (1968), 14 McG. L. J. 209.

12. An example would undoubtedly be actions for declaration of invalidity of marriage because of non-compliance with solemnization requirements. See also the text accompanying footnote 15.

"jurisdiction of these officers of the court would be determined to some extent by constitutional considerations, although the Commission envisages no difficulty in their having the power to deal with certain uncontested matters and certain motions and applications for interim relief."[13]

The constitutional limitations referred to by the Commission are those which have already been raised, namely, that, while Parliament can confer jurisdication on anyone it chooses, the provincial legislatures cannot confer jurisdiction of a type broadly conforming to that normally exercised by superior court judges on anyone other than those judges.

There is, however, a method whereby the provincial legislatures can overcome this restriction to some extent. In matters in which jurisdiction is of a type broadly conforming to that normally exercised only by superior court judges, the provincial legislatures can authorize subordinate judicial officers to act as referees, with the judges having the power to act on their recommendations.[14] If this method were used, the burden of so much of the workload as it was thought advisable to shift from the superior court judges to their subordinate judicial officers could be effectively transferred in spite of the apparent constitutional obstacle.

The question then naturally arises as to which matters can be dealt with finally by subordinate judicial officers and which can only be dealt with on references. It is a question to which the Commission did not attempt to give an answer, probably because of the paucity of judicial authority on the point. However, a working paper on a unified family court system prepared in 1972 by the Alberta Institute of Law Research and Reform suggested that the following matters be dealt with only by superior court judges in a unified family court: divorce, nullity, judicial separation, restitution of conjugal rights, loss of consortium, actions concerning matrimonial property, jactitation of marriage, declarations of status including declarations of legitimacy, guardianship of property.[15] Since some of these matters are within exclusive Parliamentary competence and since Parliament can confer jurisdiction on anyone it chooses, clearly this list cannot be taken to be a list of family law matters in which superior court judges are compelled to make final adjudications. Nevertheless, for so many of these matters as are within provincial legislative competence the list can be taken as an informed prediction as to those matters in which subordinate judicial officers can only act as referees.

If the method of unification outlined above were implemented, all family law matters would henceforth be dealt with in the superior court

13. Op. cit., 27.
14. Footnote 7, **supra**. See also **Zacks v. Zacks**, (1973) S.C.R. 891, 905-908.
15. Pp. 42-43.

of each province. Those matters which it was thought appropriate to have the judges of those courts deal with would be heard by them, while the rest of the workload would be transferred to the subordinate judicial officers, either outright or by the device of using them as referees. While such a scheme would not necessarily lead to the best unified family court system, it would go as far as can be gone within the constraints imposed by the present constitution. Whether the Law Reform Commission of Canada will ultimately choose to recommend a scheme along these lines or will rather recommend constitutional amendment to allow the implementation of some different scheme remains to be seen.

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